NO. 89-519

Supreme Court, U.S.
FILED
SEP 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

DEBRA BURR, WIFE OF/AND WILLIE BURR
Petitioners

versus

HUTHNANCE DRILLING COMPANY and the D/V VANGUARD II
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STEPHEN B. MURRAY
MURRAY LAW FIRM
650 Poydras Street
Suite 1450
New Orleans, Louisiana 70130
(504) 525-8100

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

451

QUESTIONS PRESENTED

I. Whether an injured seaman's claim for maintenance and cure benefits should be sustained when the seaman's treating physician discovers objective medical evidence of an injury and expresses the opinion that the injury so discovered was caused by an accident which occurred while the seaman was in the service of his vessel, *or* whether a seaman may be deprived of maintenance and cure benefits under such circumstances based on the district court's decision to give greater weight to the expert testimony of other physicians who treated or examined the seaman and expressed contrary opinions as to the existence and/or cause of the injury.

II. Whether, if this Court determines that Petitioner is entitled to maintenance and cure benefits for the period in question, Petitioner is also entitled to compensatory and punitive damages for defendant's refusal to pay such benefits.

LIST OF INTERESTED PERSONS

The persons and entities having an interest in the outcome of this matter are Petitioners Willie Burr and Debra Burr, and Respondents Huthnance Drilling Company and D/V Vanguard II.

TABLE OF CONTENTS

PAGE

Questions Presented i
List of Interested Persons ii
Table of Contents iii
Index of Authorities iv
Preamble (Petition for Cert) 1
Opinions Below 1
Jurisdiction 2
Statutory Provisions 2
Statement of the Case 2
Reasons for Granting the Writ 7
Conclusion 16
Certificate of Service 17
Certificate of Appendices 17

APPENDIX

APPENDIX A
Panel Opinion of the United States Court of Appeals for the Fifth circuit, No. 88-4819 ..... A-1
APPENDIX B
Denial of Rehearing by the Fifth Circuit A-6
APPENDIX C
Judgment of the United States District Court, Western District of Louisiana, C.A. No. 87-1757, November 7, 1988 ..... A-8
APPENDIX D
Order, Findings of Fact and Conclusions of Law by the District Court, October 27, 1988 ..... A-10
APPENDIX E
Excerpts from trial testimony (by deposition) of Dr. Stuart Phillips (retranscribed from pp. 140-145 of deposition transcript) A-20

INDEX OF AUTHORITIES

CASES **PAGE**

Aguilar v. Standard Oil Co.,
318 U.S. 724, 95 S.Ct. 1381, 43 L.Ed.2d 682
(1975) 8,9

Calmer S.S. Corp. v. Taylor,
303 U.S. 525, 58 S.Ct. 651, 82 L.Ed. 993
(1938) 8,9

Desmond v. United States,
217 F.2d 948 (2nd Cir. 1954) 14

Farrell v. United States,
366 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850
(1949) 8

Vaughan v. Atkinson,
369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88
(1962) 9,10,11

Vella v. Ford Motor Co.,
421 U.S. 1, 95 S.C.t. 1381, 43 L.Ed.2d 682
(1975) ..... *passim*

OTHER AUTHORITES

28 U.S.C. §1254(1) 2

28 U.S.C. §1333 5

46 U.S.C. §688 5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DEBRA, WIFE OF/AND WILLIE BURR
Petitioners

versus

HUTHNANCE DRILLING COMPANY and the D/V VANGUARD II
Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

The petition of Debra and Willie Burr respectfully prays that a Writ of Certiorari issue, to review the judgment and the opinion of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on June 9, 1989 and denial of petitioners' timely motion for rehearing, entered on July 5, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is dated June 9, 1989, styled "Debra Burr, wife of/and Willie Burr versus Huthnance Drilling

Company and the D/V Vanguard II," No. 88-4819, and is unpublished, denial of rehearing on July 5, 1989. Said opinion is appended hereto at pages A-1 through A-5.

The opinion (findings and facts and conclusions of law) of the United States District Court is styled the same, is unpublished, and is appended hereto at pages A-11 through A-19.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 5, 1989 and became final with the denial of rehearing on that date. This Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit is filed within 90 days of the denial of rehearing below. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

This is an action for maintenance and cure benefits under General Maritime Law and does not directly involve any statute or constitutional provision.

STATEMENT OF THE CASE

This action arises from an accident that occurred on August 4, 1986, at which time plaintiff Willie Burr was a seaman employed by Huthnance Drilling Company ("Huthnance") and was performing duties as a roughneck on the drill floor of the D/V Vanguard II. Mr. Burr experienced a sharp pain in his lower back while pulling slips on the vessel. He reported this accident to his supervisor, and continued to have pain in his back and a burning sensation down his legs in the days that followed the accident.

After finishing his hitch on the vessel, he returned to his home in Many, Louisiana. At that point in time, Mr. Burr had worked for Huthnance approximately four and one-half years. Since then, Mr. Burr has not returned to work for Huthnance.

Mr. Burr's back pain continued after he returned home, so he sought treatment from physicians in that area. The first doctors who treated him diagnosed strain of the ligaments and muscles of the lumbar spine. X-rays and a CT scan were interpreted as normal. Upon receiving this information, Huthnance instituted maintenance and cure payments.

When Mr. Burr's complaints of back pain continued despite conservative treatment, he was referred to a "pain clinic" in Shreveport, Louisiana for further evaluation. He was hospitalized at the pain clinic for eleven days in March, 1987, during which time X-rays were taken of his lumbar spine. The radiologist interpreting the x-rays noted an abnormality at the L5-S1 level, and suggested additional X-rays if the condition continued. At the request of plaintiff's primary care physician at the pain clinic, Dr. Phillip Osborne, an MRI was performed which noted posterior disc protrusion most prominent at L5-S1. The radiologist read the MRI as suggesting some herniation.

Nevertheless, Mr. Burr was released from the pain clinic on March 20, 1987, and Dr. Osborne forwarded a discharge summary for plaintiff to return to work as of April 10, 1987. It was the opinion of Dr. Osborne and other physicians who examined him at the pain clinic that no physical findings supported Mr. Burr's continued complaints of back pain. A psychological examination performed during plaintiff's hospitalization led the examining physician to conclude that plaintiff was suffering from "a

heightened anxiety level, a psychogenic pain disorder, and a mixed personality disorder."

Relying on Dr. Osborne's discharge report, Huthnance terminated maintenance and cure payments effective April 19, 1987.

After benefit payments were discontinued, plaintiff advised his employer that he was still experiencing back pain and was unable to return to work. Mr. Burr continued to experience pain through June, 1987, and was referred by his attorneys to Dr. Stuart Phillips, an orthopedic surgeon in New Orleans.

On initial examination(June 23, 1987), Dr. Phillips detected that Mr. Burr had significant loss of range of motion in the lumbar spine area and muscle spasm. Dr. Phillips ordered a number of diagnostic tests, suspecting that plaintiff may have been suffering from a deep internal disc derangement of L4-5 or L5-S1. These tests, which included a CT scan, an MRI and a discogram, were performed in July, 1989, and confirmed Dr. Phillips' earlier suspicion of deep internal derangement of the L5-S1 disc, with protrusion. Dr. Phillips recommended that Mr. Burr undergo an anterior lumbar fusion.

Plaintiffs' counsel forwarded Dr. Phillips' findings and recommendation of surgery to Huthnance, and made repeated requests for reinstatement of maintenance and cure benefits. Huthnance denied all of these requests.

After receiving Dr. Phillips' diagnosis and recommendations, Huthnance requested that Mr. Burr be examined again by Dr. Osborne, who had released plaintiff to return to work the previous Spring. In a report dated September 25, 1987, Dr. Osborne stated that he stood by

his earlier diagnosis, but felt that Mr. Burr should be given the benefit of the doubt and that the treatment recommended by Dr. Phillips should be provided to him. Huthnance then had Mr. Burr examined by another physician, Dr. Jaqmes McDaniel, who disagreed with Dr. Phillips' diagnosis and recommended that a psychological examination be performed. After Huthnance refused plaintiffs' request that it authorize the psychological examination recommended by Dr. McDaniel, Dr. Phillips ordered a psyschological consultation. Dr. Elaine Salzer conducted the psychological examination and concluded that while Mr. Burr's psychological condition was affecting his physical condition, he was not a malingerer.

Dr. Phillips performed the anterior lumbar fusion on January 13, 1988. The surgery confirmed his preoperative diagnosis of internal disc derangement. He excised a large amount of frankly degenerative material and placed 5 bone dowels in the L5-S1 interspace. The pathologist's report confirmed that the disc material was degenerative. The post-operative report was forwarded to Huthnance, which again refused to reinstate benefits.

Mr. Burr and his wife Donna originally filed suit against Huthnance and the D/V Vanguard II on August 17, 1987 in United States District Court for the Western District of Louisiana, asserting damages for negligence under the Jones Act, 28 U.S.C. §688, and unseaworthiness under General Maritime Law, 28 U.S.C. §1333. After Dr. Phillips discovered the disc injury and Huthnance refused to reinstate maintenance and cure benefits, plaintiffs filed an amended complaint, seeking reinstatement of maintenance and cure and alleging entitlement to damages on the ground that Huthnance's refusal was arbitrary, capricious and without probable cause. On plaintiffs' motion, the maintenance and cure claim was severed from the

Jones Act and General Maritime Law claims. Trial of the Jones Act and unseaworthiness claims is currently scheduled for December 7, 1989.

Dr. Phillips testified at trial (by deposition) that in his opinion, and to a reasonable degree of medical probability, the internal disc derangement which he diagnosed and confirmed through surgery was caused by the incident on August 4, 1986, when Mr. Burr experienced back pain pulling slips on the vessel. Dr. Phillips further testified that the type of activity described, pulling slips, could cause an internal disc derangement. Dr. Phillips' opinion was based upon his review of medical records from the physicians who had previously treated plaintiff, his own examinations and diagnostic tests and the history received from plaintiff.

Huthnance's position at trial was that Mr. Burr's internal disc derangement was not caused by the August 4, 1986 incident, and must have been caused by some other incident. However, no evidence was presented which demonstrated that Mr. Burr suffered injury to his back in any incident or accident other than the August 4, 1986 incident which forms the basis of this suit.

Following the trial, the district court dismissed plaintiff's maintenance and cure claim and claim for punitive damages, by judgment dated October 27, 1988. On the same date, the district court issued findings of fact and conclusions of law, wherein the court found that plaintiff seaman had suffered an injury while in service of his vessel on August 4, 1986, but had not proven by a preponderance of the evidence that he continued to suffer from said injury after April 19, 1987, the date that Huthnance terminated maintenance and cure benefits. The district court also found that the plaintiff reached maximum medical cure on April 10, 1987.

On the motion of defendants, the district court's judgment was certified as final under Rule 54(b) of the Federal Rules of Civil Procedure on November 8, 1988. Plaintiffs timely appealed the district court's judgment to the United States Court of Appeals for the Fifth Circuit. In an unpublished *per curiam* opinion dated June 9, 1989, the Fifth Circuit affirmed the district court's dismissal of the maintenance and cure claim. On July 5, 1989, the Fifth Circuit denied plaintiffs' suggestions for panel rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly recognized the importance of affording an adequate and certain maintenance and cure remedy to injured seamen. This case merits the consideration of this Court not merely because the lower courts' erred in their denial of benefits to this particular plaintiff, but also because the denial of benefits in this case sets a disturbing precedent in the maintenance and cure areas, a precedent which, if allowed to stand, may significantly impair the ability of many injured seamen to receive maintenance and cure benefits in furture cases.

If, as the lower courts have held in this case, an injured seaman cannot recover maintenance and cure benefits even when his treating physician, a qualified orthopedic surgeon, confirms through surgery the existence of an objective injury, and affirmatively relates that injury to an accident which occurred while the seamen was in the service of his vessel, then future maintenance and cure disputes will be reduced to "battles of experts." In resolving such battles, the trier of fact will be free to reject findings of the injured seaman's treating physician(s) in favor of the opinions of physicians retained by the shipowner or its insurer. Since most personal injury cases involve some

conflicting medical testimony, the availability of maintenance and cure in a particular case will depend upon which party's medical expert is most persuasive, and employers will be encouraged to litigate maintenance and cure claims in all but the clearest cases of seamen's injuiries. While shipowner's might applaud such a turn of events, the result would be an infringement upon maintenance and cure remedy that is inconsistent with the prior opinions of this Court.

"The shipowner's ancient duty to provide maintenance and cure for the seaman who becomes ill or is injured while in the service of his ship derives from the 'unique hazards [which] attend the work of seamen,' and fosters the 'combined object of encouraging marine commerce and assuring the well-being of seamen.'" *Vella v. Ford Motor Company,* 421 U.S. 1, 3-4, 95 S.Ct. 1381, 1383, 43 L.Ed.2d 682 (1975), *quoting Aguilar v. Standard Oil Co.,* 318 U.S. 724, 727, 63 S.Ct. 930, 932, 87 L.Ed. 1107 (1943). The duty to pay such benefits arises irrespective of the absence of shipowner negligence and irrespective of whether the injury was suffered in the course of the seaman's employment. *Calmar S.S. Corp. v. Taylor,* 303 U.S. 525, 527, 58 S.Ct. 651, 652, 82 L.Ed. 993 (1938).

This Court has emphasized the need for a system of laws which ensures the *certainty* of maintenance and cure payments for injured seamen, and which discourages litigation and delay. "Thus, the breadth and inclusiveness of the shipowner's duty [to pay maintenance and cure] assure its easy and ready administration," *Vella v. Ford Motor Company supra,* 421 U.S. at 4, 95 S.Ct. at 1383, and there are "few exceptions or conditions to stir contentions, cause delays, and invite litigations." *Farrell v. United States,* 336 U.S. 511, 516, 69 S.Ct. 707, 710, 93 L.Ed. 850 (1949).

In *Aguilar v. Standard Oil Co., supra,* this Court characterized the shipowner's liability for maintenance and cure as "the most pervasive" of all, not to be "narrowly confined." 318 U.S. at 735, 63 S.Ct. at 936. The reason for this broad and liberal protection is that seamen are considered the wards of admiralty courts. *Calmar S.S. Corp. v. Taylor, supra,* 303 U.S. at 528-29; 58 S.Ct. at 654. The maintenance and cure remedy recognizes the peculiar vulnerabilities of seamen to injury and illness, the need to encourage masters and owners to protect the health and safety of seamen while in service, and the need to provide a system of benefits which will encourage persons to accept employment in the perilous merchant marine environment. *Id.* Thus, in maintenance and cure disputes, all ambiguities or doubts should be resolved in favor of the seaman. *Vaughan v. Atkinson,* 369 U.S. 527, 532, 82 S.Ct. 997, 1000, 8 L.Ed. 2d 88 (1962); *Warren v. United States,* 340 U.S. 523, 71 S.Ct. 432, 95 L.Ed. 503 (1951).

Utilizing the foregoing general principles, this Court has not hestitated to reverse lower court decisions which purported to restrict or impede seamen's rights to maintenance and cure benefits. For example, in *Vella v. Ford Motor Company,* the seaman suffered a disabling injury for which, from the moment of injury forward, there was probably no hope of recovery. The shipowner therefore took the position that no maintenance and cure benefits were owed, on the ground that "maximum cure," the point in time at which the seamen reaches maximum recovery, occurred at the time of the accident. The seaman, on the other hand, argued that maintenance and cure benefits were owed until some four years after the accident, when the first actual diagnosis was made declaring the seaman's condition incurable. Agreeing with the seaman's position, and reversing the court of appeal's contray holding, this Court reasoned that denyig maintenance and cure prior to

the date of diagnosis of permanent injury, even when the injury was permanent from the moment of the accident, "would obviously disserve and frustrate the 'combined object of encouraging marine commerce and assuring the well-being of seamen.'" 421 U.S. at 4; 95 S.Ct. at 1383. The Court added if the shipowner's position were adopted, "uncertainty would displace the essential certainty of protection against the ravages of illness and injury that encourages seamen to undertake their hazardous calling," and "easy and ready administration of the shipowner's duty would seriously suffer from the introduction of complexities and uncertainty that could 'stir contentions, cause delays, and invite litigations.'" *Id.*

Similarly, in *Vaughan v. Atkinson, supra*, this Court rejected the proposition that a seaman's maintenance and cure benefits could be reduced by the seaman's earnings at another job during the period for which maintenance benefits were owed. The Court concluded that a rule allowing for such a deduction "would be a dreadful weapon in the hands of unconscionabale employers and a plain inducement. . .to use the withholding of maintenance and cure as a means of forcing sick seamen to go to work when they should be resting, and to make the seamen themselves pay in whole or in part the amounts owing as maintenance and cure." 369 U.S. at 533, 82 S.Ct. at 1001. The Court emphatically added that such a result would be at war "with the liberal attitude that heretofore has obtained and with admiralty's tender regard for seamen." *Id.*

The opinions of the lower courts in this case reflect no "tender regard for seamen," and no liberality with respect to maintenance and cure. While the issue presented by this case is somewhat different than the issues presented in *Vaughan* and *Vella*, the priciples underlying this Court's holdings in those cases are applicable. Further-

more, the impact of leaving the lower courts' rulings undisturbed would be the same as the impact sought to be avoided in *Vaughan* and *Vella*, i.e., a legal result which would greatly decrease certainty of compensation in maintenance and cure cases, increase litigation and encourage seamen to return to work before they are fully recovered from their injuries.

If allowed to stand, the rulings of the lower courts would be precedent for the proposition that even when the seamen's treating physician finds that the seaman is suffering from an a verified orthopedic injury which was caused by an accident in the service of the vessel, the trier of fact is free to reject this testimony in favor of testimony of defense doctors who offer a different opinion. While such a result might be appropriate where there are no facts which collaborate the treating physician's opinion as to the existence of an injury, or where reasons exist to question the credibility of the treating physician, this is not such a case.

This seaman was in good health prior to the accident, and had constant complaints of back pain thereafter. Though the doctors who initially treated him could not find a medical explanation for his continuing pain (other than a ligamentous strain which they felt should been of short-term duration), the medical explanation was later discovered by an orthopedic surgeon, whose credibility was never questioned *and whose diagnosis of internal disc derangement was confirmed by surgery.* There being no evidence that any other incident or accident caused the back injury, plaintiff's treating physician expressed the view that the disc injury was caused by the incident that occurred when the seamen felt pain in his back while pulling slips on the vessel.

The district court's findings of fact and conclusions

of law do not offer a satisfactory explanation for rejecting the findings and conclusions of Dr. Phillips. It appears evident that in spite of the fact that surgery confirmed that the seamen suffered a disc injury, the district court was persuaded by the opinion of doctors called by the defense who reached the conclusion, prior to the surgery, that plaintiff was not suffering from a legitimate injury and may have been malingering. *See* District Court's Findings of Fact Nos. 3-12, 19-20, 21; Conclusions of Law Nos. 6-8. Based on the representations of these doctors, the trial judge questioned plaintiff's credibility. Finding of Fact No. 24.

However, once surgery confirmed the existence of a disc injury, which the district court acknowledges to be the case, Finding of Fact No. 21, the pre-operative opinions of the defense doctors, and speculation by them regarding the credibility of the seaman's complaints of pain, became (or should have become) irrelevant. Absent a finding that another incident caused the injury, the seaman established causation by showing that he had been in good health prior to the August 4, 1986 incident, and experienced continual back pain since the accident and up to the time that the disc condition was discovered through surgery.

The trial court made no finding that any other incident or accident caused the disc injury. Instead, it simply stated, in finding of fact No. 22, that "Dr. Phillips could not say that the degenerative disc was caused by the incident August 4, 1986 aboard the Vanguard II." With due respect to the district court, this finding was directly in conflict with the actual testimony of Dr. Phillips (the transcript of pertinent portions thereof is set forth in the appendix to this application). At page 141 of his deposition, Dr. Phillips testified that "Given the history that Mr. Burr gave me in my original in-take history, I would relate the

findings that I found at surgery to the incident that he related to me of the slip and the injury to his back."

The trial court seemed to discount Dr. Phillips' opinion because it was based in part on the history Mr. Burr gave him regarding the accident. *See* Finding of Fact No. 23. Yet in any personal injury case, a treating physician must rely on the history provided by the patient, unless the treating physician happened to witness the accident. When as here, objective medical findings are consistent with the history given by the seamen, the seamen should win on the causation issue unless there is evidence of some other cause of the medical injury. Here there was no such evidence.

In essence, the trial court decided to reject the opinion of the plaintiff's treating physician, in spite of the objective medical evidence of injury, and to accept the opinion testimony of defense medical experts. Plaintiffs recognize that in the ordinary tort case the trier of fact has broad discretion in deciding whether to accept or reject expert testimony, and in assessing the credibility of complaints of injury. In a maintenance and cure action, however, it is urged that when the plaintiff's treating physician, whose credibility and expertise is not challenged, finds objective evidence of injury, links that injury to an incident which occurred while the seamen was in the service of his vessel, and no evidence of intervening injury is shown, the plaintiff has met his maintenance and cure causation burden. To follow the district court's approach of choosing defense expert opinion testimony over the opinion of a credible treating physician frustrates the certainty of the maintenance and cure remedy and the remedy's policy objectives, while inviting contentions, delays and litigation. *Vella v. Ford Motor Company, supra.*

The Fifth Circuit's decision to address this case

through an unpublished, *per curiam* opinion reflects its view that this was simply a case in which the trial judge had discretion to choose between conflicting expert testimony, not subject to reversal unless there was clear error. Fifth Circuit Slip Op. at 4. The Fifth Circuit did not address the case in terms of the heigthened protection traditionally afforded by this Court in maintenance and cure cases.

In fact, and with due respect, the Fifth Circuit's opinion may have been premised in its entirety on the panel's erroneous conclusion that "the district court found that Burr was not injured on August 4th aboard the Vanguard II, and that, if he presently exhibited any signs of injury, that injury occurred after April 10, 1987." As previously noted, the distsrict court's first finding of fact was that plaintiff *did* suffer an injury on the vessel on August 4, 1986. Furthermore, the district court never found that a separate injury occurred after April 10, 1987. It would be understandable for the Fifth Circuit to issue a *per curiam* affirmance in a case where the district court found no injury caused by an accideant in the service of a vessel, or where the district court found an intervening injury, *but this is not such a case!*

In *Vella, supra,* 421 U.S. at 6 n. 5, 95 S.Ct. at 1384 n. 5, this Court cited with approval the following language in *Desmond v. United States,* 217 F.2d 948, 950 (2nd Cir. 1954):

> "The shipowner's obligation to furnish maintenance is co-extensive in time with his duty to furnish cure. . .and neither obligation is discharged *until the earliest time when it is reasonably and in good faith determined by those charged with the seamaan's care and treat-*

ment that the maximum cure reasonably possible has been effected." (Emphasis by this Court)

Plaintiffs submit that this case is worthy of review by this Court because it presents the issue of what the proper result should be when "those charged with the seamen's care and treatment" disagree as to the date of maximum cure. When, as here, objective medical evidence verifies the opinion of the seaman's treating physicin that the seaman is suffering from an ongoing injury incurred in service of the vessel, the result must be that maintenance and cure benefits are owed for the period of continuing injury found by the treating physician. (In this case, Dr. Phillips testified that the seaman would probably reach maximum cure one year after his January 11, 1989 surgery, and plaintiffs thus seek reinstatement of benefits from the date of termination, April 19, 1987, through January 11, 1990). Otherwise, the emphatic commitments which this Court has made regarding protection of seamen and their maintenance and cure remedy are at grave risk of becoming empty promises.

In the event that this Court reviews the denial of maintenance and cure benefits and determines that benefits were owed, plaintiffs also requests review and reversal of the lower courts' findings that punitive damages are not owed by Huthnance for denial of benefits on grounds that were arbitrary, capricious and without cause. Plaintiffs also seek review and reversal of the lower courts' denial of compensatory damages for wrongful failure to pay maintenance and cure benefits, and reversal of the district court's ruling that plaintiffs' entitlement to said damages was not properly plead.

CONCLUSION

For all the reasons set forth herein and such other reasons as this Court may deem fit and proper a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, should and ought to issue herein and the opinion and judgment of the Honorable Court, concerned herein, should be reversed, and there should be judgment in favor of plaintiffs for maintenance and cure and compensatory and punitive damages, as set forth above.

MURRAY LAW FIRM

STEPHEN B. MURRAY
650 Poydras Street
Suite 1450
New Orleans, Louisiana 70130
(504) 525-8100

CERTIFICATE OF SERVICE

I, Stephen B. Murray, a member of the bar of this Court, hereby certify that on the _____ day of September, 1989, three copies of the Petition for Writ of Certiorari in the above entitled case were mailed, first class, postage prepaid, to counsel for defendants, Charles A. Mouton, Preis, Kraft, Laborde & Daigle, Post Office Drawer 94-C, Lafayette Louisiana 70509.

I further certify that all of the appendicies attached hereto and filed herein are true copies of what they purport to be.

_____

Stephen B. Murray, Attorney for Petitioner

Sworn to before me this _____ day of September, 1989.

_____

NOTARY PUBLIC

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-4819
Summary Calendar

DEBRA BURR and WILLIE BURR,
Plaintiffs-Appellants

versus

HUTHNANCE DRILLING CO. and
D/V/ VANGUARD 2,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(CV87-1757)

(June 9, 1989)

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:[1]

---

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Willie Burr was injured aboard the VANGUARD II, a drilling vessel. His employer paid Burr maintenance and cure during his recovery. Believing that Burr was fully recovered, his employer ceased payments. Burr, dissatisfied, brought the instant action for further maintenance and cure payments and for punitive damages for the premature termination of the benefits. The lower court found that Burr was not entitled to further benefits. We affirm.

Willie R. Burr was employed as a roustabout aboard the VANGUARD II, a drilling vessel owned and operated by Huthnance Offshore Corporation, Burr's employer. Burr injured his back while working aboard the VANGUARD II. As a result of his accident Burr sued Huthnance, alleging negligence and unseaworthiness, and seeking maintenance and cure benefits from Huthnance. Huthnance paid Burr benefits for approximately eight months, during which time Burr was examined and treated by six physicians, a psychologist, and a trained physical therapist. None of these treating specialists found a physiological basis for Burr's complaints. Burr was released for work by his primary physician on April 10, 1987. Huthnance discontinued maintenance payments on the 19th of April.

Burr, however, continued to complain to Huthnance that he was still in pain and was unable to return to work. Huthnance refused to reinstate benefits, and Burr sought the advice of his attorney. The attorney referred Burr to an orthopedic surgeon, Dr. Phillips, for further examination. On the basis of a physical examination and a review of the medical records of three of Burr's earlier doctors, Dr. Phillips concluded Burr suffered from a deep internal disc derangement. One of Dr. Phillips' colleagues, a radiologist, concurred in this diagnosis. Another orthopedist, however,

conducting a physical examination of Burr and reviewing his now extensive file concluded that Burr had no injury. Dr. Phillips also had Burr examined by a psychologist who concluded that Burr's psychological condition contributed to his pain. This conclusion concurred with the conclusion by a psychologist who examined Burr prior to his earlier discharge. Dr. Phillips performed an anterior lumbar fusion on Burr in Januaray of 1988. The removed tissue was degenerative, although it was disputed at trial whether this degeneration was the normal result of aging. Burr informed Huthnance of the reports of the reports of his new physician and again requested reinstatement of maintenance and cure benefits so that he could continue his treatments. Huthnance refused without further investigation. Relying on the reports of Burr's earlier doctors, Huthnance concluded that either Burr was not injured or he was injured after April 10, 1987. Eventually, Burr asserted a claim for punitive damages against Huthnance for terminating his maintenance and cure benefits. Burr's claim for maintenance and cure benefits and punitive damages were severed for trial.

After trial to the court without a jury, the district judge entered his finding of facts and conclusions of law. The court found that Burr reached maximum medical cure on April 10, 1987, and thus his entitlement to maintenance and cure benefits ended on that date. *See Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89, 95 (5th Cir. 1985). In regard to Burr's continuing complaints, the court found that Dr. Phillips' diagnosis and treatment was based primarily on the accuracy of Burr's complaints and that Burr was not credible. Burr's physical therapist had noted that Burr's limp shifted sides erratically, and his examining psychologists testified that his complaints were psychogenic. In short, the district court found that Burr was not injured on August 4th aboard the

VANGUARD II, and that, if he presently exhibited any signs of injury, that injury occurred after April 10, 1987. Burr challenges each of these conclusions.

The district court's factual findings are reviewed under a clearly erroneous standard. *Breese v. AWI, Inc.*, 823 F.2d 100, 103 (5th Cir. 1987). In reviewing the findings of the lower court, we are precluded from re-evaluating the credibility of the witnesses. *Glass v. Petro-Tex Chemical Corp.*, 757 F.2d 1554, 1559 (5th Cir. 1985). Any "ambiguities or doubts in the application of the law of maintenance and cure are resolved in favor of the seaman." *Breese*, 823 F.2d at 104.

The district court's findings in this case carry substantial support. A battery of doctors could find no physical evidence of Burr's injury and gave him a clean bill of health. After this wealth of medical evidence established Burr's health, his benefits were stopped. It was only later that he was examined by Dr. Phillips. Although Dr. Phillips testified that Burr was injured and that his injury was caused by his accident aboard the VANGUARD II, this opinion relied on Burr's statements. Other evidence adduced at trial, however, provided ample reason to discount those statements. In light of the body of contrary medical opinion and the determination that Burr was not credible, the district court's findings are not clearly erroneous. Burr failed to meet his burden of proving, by a preponderance of the evidence, that his injury, if any, occurred, was aggravated, or manifested itself while in the service of his vessel. *Smith v. Transworld Drilling Co.*, 773 F.2d 610 (5th Cir. 1985).

Burr argues that his claim for maintenance and cure is adequately supported, as a matter of law, because of the testimony of Dr. Phillips. Burr relies on the following

sentence in this circuit's *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1359 (5th Cir. 1987): "An award for future maintenance and cure is justified when supported by a physician's testimony." Burr's reliance is misplaced. In *Morales*, the testifying physician's testimony was uncontroverted. *Id.* at 1360. *Morales* is distinguishable from the present situation where a number of specialists found no injury and the single contrary opinion was based on untrustworthy medical history.

The decision of the lower court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-4819

FILED
JUL 5 1989

DEBRA BURR and WILLIE BURR,
Plaintiffs-Appellants,

versus

HUTHNANCE DRILLING CO. and
D/V VANGUARD 2,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 06/09/89, 5 Cir., 198__, ____F.2d____)
(July 5, 1989)

Before CLARK, Chief Judge, JOHNSON and JOLLY,
Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the requests of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

FILED
NOV 7 1988

DEBRA BURR, WIFE OF/AND	*	CIVIL ACTION NO. 87-1757
WILLIE BURR	*	SECTION L
VERSUS	*	JUDGE DUHE
HUTHNANCE DRILLING COMPANY, D/V VANGUARD II, AND ABC INSURANCE COMPANY	*	MAGISTRATE METHVIN

* * * * * * * * * * *

JUDGMENT

Pursuant to this court's Order of October 27, 1988, dismissing plaintiff's claim for maintenance and cure payments and for punitive and compensatory damages for failure to pay maintenance and cure against defendants, Huthnance Drilling Company and D/V VANGUARD 2, and upon the court's determination that there is no just reason for delay in the entry of a final judgment;

IT IS HEREBY ORDERED that judgment be entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, dismissing plaintiff's claim for maintenance and cure payments, plaintiff's claim for punitive damages for failure to pay maintenance and cure and plaintiff's claim for compensatory damages for failure to pay maintenance and cure, with prejudice.

Lafayette, Louisiana, this 7th day of November, 1988.

/s/ John M. Duhe, Jr.
UNITED STATES DISTRICT JUDGE

Judgment Entered Nov 8, 1988
By C Darnell
Copy To Murray/Murray/Michel
Cainsburgh
Mouton/Daigle/Austin

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FILED
OCT 27 1988

DEBRA BURR, ET UX

VS. CIVIL ACTION NO. 87-1757 "L"

HUTHNANCE DRILLING COMPANY, ET AL JUDGE JOHN M. DUHE, JR.

MAGISTRATE MILDRED METHVIN

ORDER

For the written reasons assigned in the Memorandum Ruling of this date:

IT IS ORDERED that judgment is hereby rendered in favor of defendant Huthnance Drilling Company, et al., and against plaintiffs Debra Burr and Willie Burr.

Plaintiff's claim for maintenance and cure payments, and further claims for punitive and compensatory damages against the defendant for failure to pay maintenance and cure are DISMISSED WITH PREJUDICE.

Lafayette, Louisiana, October 27, 1988.

/s/ John M Duhe, Jr.
JUDGE, U. S. DISTRICT COURT

Judgment Entered October 28, 1988

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FILED
OCT 27 1988

DEBRA BURR, ET UX

VS. CIVIL ACTION NO. 87-1757 "L"

HUTHNANCE DRILLING COMPANY, ET AL
JUDGE JOHN M. DUHE, JR.

MAGISTRATE MILDRED METHVIN

FINDINGS OF FACT

Factual findings necessary to dispose of the maintenance and cure issue in this case based upon the evidence adduced at trial on September 6, 1988 are as follows:

1. On or about August 4, 1986, plaintiff Willie R. Burr was employed as a roustabout aboard the jack-up drilling vessel Vanguard II, a vessel owned and operated by Huthnance Offshore Corpcration. He was a seaman and member of the crew of that vessel. While working aboard the Vanguard II, the plaintiff sustained an injury while pulling slips on the drill floor.

2. After completing his hitch aboard the vessel, the plaintiff was treated for complaints of back pain by Dr. Garland Miller, a general practitioner in Zwolle, Louisiana. Dr. Miller prescribed medication for his complaints, ordered x-rays and a CT scan, and received authorization

from Huthnance to treat Mr. Burr at its expense. The x-rays showed evidence of muscle spasm; the CT scan was read as normal.

3. Dr. J.E. Smith, an orthopedist, treated Mr. Burr on referral from Dr. Miller from August 20, 1986 through February 9, 1987. On the plaintiff's first visit Dr. Smith's physical examination revealed a muscle strain of plaintiff's lower back. Dr. Smith evaluated the CT scan performed by Dr. Miller and interpreted it as being normal. During subsequent visits, Dr. Smith could find no objective medical evidence for the plaintiff's complaint of back pain, leg pain, and face and neck pain. Cervical and lumbar spine x-rays taken by Dr. Smith were normal. Dr. Smith released Mr. Burr to return to work in the oilfield on January 9, 1987.

4. Dr. Larry K. Broadwell, a rheumatologist, examined the plaintiff on January 20, 1987, and February 23, 1987. He performed a complete physical exam of the muscloskelatal system, but could find no objective reason for Mr. Burr's continuing complaint of arm and neck pain.

5. From August 19, 1986 to February 5, 1987 plaintiff attended 62 physical therapy sessions under the supervision of physical therapist Mary Miller, The plaintiff complained of various types of pain to Ms. Miller on an irregular and infrequent basis, and did not complain of pain in the lower lumbar area until December 2, 1986. Ms. Miller also noted an inconsistent gait discrepancy which was inconsistent with any medical findings up to that point.

6. Mr. Burr entered the Pain Management Clinic at Physicians & Surgeons Hospital ("P & S Clinic") in Shreveport on March 9, 1987. While at the P & S Clinic Dr. Philip Osborne, a specialist in treating chronic pain and

rehabilitation problems, was Mr. Burr's primary care physician. Plaintiff was also seen by a multidisciplinary team including technicians, a work fitness specialist, a psychologist, a neurosurgeon, and an orthopedist.

7. While at the P & S Clinic, plaintiff was also examined by Dr. Warren Long, a neurosurgeon. Dr. Long's physical examination revealed no evidence of nerve impingement or radicular symptoms. He found nothing from a neurological standpoint that warranted surgery.

8. While at the P & S Clinic, a physical exam and an ergometric evaluation were performed by Dr. Donald Wolfe of the Work Fitness Center. Dr. Wolfe found the physical exam to be normal and noted below average performance on tests not affecting the impaired areas. Dr. Osborne also found inconsistent results when reviewing these tests.

9. While at the P & S Clinic, the plaintiff underwent a psychological evaluation by Dr. Thomas Staats. Dr. Staats' report indicated that he felt that the plaintiff had gone beyond the normal recovery period for myoligamentous strain and that he appeared to be presenting with psychogenic pain disorder.

10. Several other tests were performed during the plaintiff's stay at the P & S Clinic, including a thermogram, lumbar spine x-rays, and an MRI. Dr. Osborne interpreted these tests as being normal.

11. Dr. Osborne discharged Mr. Burr from the P & S Clinic on March 20, 1988. Based upon his own muscloskelatal exam of the plaintiff, the findings made by the various health care personnel who evaluated the plaintiff during his stay at the P & S Clinic, and the test results, Dr. Osborne concluded that there was no basis for

Mr. Burr's continued complaints of pain.

12. Dr. Osborne found that plaintiff reached maximum medical cure on April 10, 1987, from any injury he received while working with Huthnance, and was able to return to work in the oilfield.

13. Huthnance terminated Mr. Burr's maintenance and cure benefits on April 19, 1987, based upon the medical findings to that point.

14. On referral from his attorney, Mr. Burr was examined by Dr. Stuart Phillips, an othopedic surgeon, on June 23, 1987. Based on a physical examination and a review of medical records from Drs. Broadwell, Miller and Smith, Dr. Phillips suspected a deep internal derangement of L4-5 or L5-S1.

15. On July 23, 1987, plaintiff was seen by Dr. Phillips on an emergency basis with an exacerbation of his problem. At this time, he performed a CT scan, MRI, diagnostic disc injection (discogram) post-injection CT scan, and facet block. Dr. Phillips read these tests as positive, however, he did not detect any neurological abnormality in the plaintiff throughout the entire course of treatment.

16. Upon receiving Dr. Phillips' reports, counsel for Mr. Burr wrote to Huthnance inquiring whether it would authorize the testing and treatment Dr. Phillips recommemded. Huthnance refused and based this decision on the findings of the other physicians who had seen Mr. Burr that did not diagnose this condition.

17. At the request of Dr. Phillips, Dr. Elaine Salzer conducted a psychological evaulation of Mr. Burr on

January 11, 1988. She concluded that Mr. Burr was experiencing psychological factors which affected his physical condition.

18. At the request of Dr. Phillips, Dr. Charles April, a radiologist, interpreted the CT scan and the MRI and concurred in Dr. Phillips' diagnosis.

19. Mr. Burr returned to see Dr. Osborne on September 1, 1987. Dr. Osborne sent a report to counsel for Huthnance on September 25, 1987, concluding that while it was his opinion that Mr. Burr was able to return to work when he was released from the pain clinic, he recommended that any doubt be resolved in favor of providing treatment.

20. Dr. James C. McDaniel, an orthopedist, saw Mr. Burr on October 7, 1987 for an examination. Dr. McDaniel reviewed Mr. Burr's medical records from Drs. Phillips Broadwell, Miller, Smith, and Osborne. He also reviewed films from the CT scan, MRI, and discograms done in July 1987, and conducted a physical examination of the plaintiff. He concluded that the plaintiff had no orthopedic or neurological injury.

21. An anterior lumbar fusion was performed by Dr. Phillips on Mr. Burr on January 11, 1988. the disc material excised by Dr. Phillips was degenerative.

22, Dr. Phillips could not say that the degenerative disc was caused by the incident August 4, 1986 aboard the Vanguard II.

23. Dr. Phillips recognized that his decision to perform surgery on the plaintiff was based, to a large extent, on the acuracy of plaintiff's complaints.

24. Plaintiff's credibility is poor. Physical therapist Miller and Dr. McDaniel found that plaintiff was a malingerer, and there were other findings of psychogenic pain disorder. Additionally, there were a number of inconsistencies between his complaints and medical findings including;

a. Plaintiff complained to Dr. Smith of face and neck pain yet there were no medical finding to support the complaint.

b. Plaintiff complained of arm and neck pain to Dr. Broadwell without any medical findings to support them.

c. Plaintiff made inconsistent complaints of back pain to his therapists.

d. Plaintiff failed to perform the tests run at the P & S Clinic with maximum effort, and many of these tests yielded inconsistent results.

25. Defendant paid maintenance and cure from the accident to April 19, 1987. Plaintiff reached maximum medical cure April 10, 1987.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this maintenance and cure claim and related claims for the failure to pay maintenance and cure pursuant to Federal Maritime Law, 28 U.S.C. § 1333.

2. When a seaman becomes ill or is injured while in the service of the vessel, the vessel owner must pay him maintenance and cure regardless of whether the vessel owner caused the seaman's injury or the ship was

unseaworthy. *Gaspard v. Taylor Diving & Salvage Co.*, 649 F.2d 372, 374 n. 3 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

3. Maintenance is a subsistence allowance, and cure is the payment of all medical expenses actually incurred, and the taking of all reasonable steps to ensure that the seaman receives proper care treatment. *Id.*

4. The obligation to pay maintenance and cure exists until the seaman has reached maximum medical benefit, that point at which further medical treatment probably will not improve his condition. *Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89, 95 (5th Cir. 1985).

5. A seaman bears the burden of proving, by a preponderance of the evidence that his illness or injury occurred, was aggravated, or manifested itself while in the service of the ship. *Patterson v. Rio Grand Transport, Inc.*, 549 F.2d 201 (5th Cir. 1975); *Matherne v. Cheramie Boat Rentals, Inc.*, 550 F. supp. 1124 (E.D. La. 1982).

6. The plaintiff has not borne his burden of proving by a preponderance of the evidence that he has suffered from any illness, injury or disease caused by the August 4, 1986 incident aboard the Drilling Vessel Vanguard II beyond the period for which he has been paid maintenance and cure.

7. Plaintiff reached maximum medical cure on April 10, 1987.

8. Any back injury or condition which resulted in back pain to plaintiff following April 19, 1987 were not causally related to any injury or condition which manifested itself while plaintiff was in the employ of Huthnance.

9. The following evidentiary rulings are made in regard to the deposition testimony of Dr. Warren Founds:

a. Page 25, lines 6-19.

Inadmissible. An opinion regarding the effects of diabetes is irrelevant.

b. Page 30, line 1-10.

Inadmissible. No personal knowledge on the part of Dr. Founds.

c. Page 32, lines 15-25 through page 36, line 18.

Inadmissible. What Dr. Founds might have done in a pre-employment physical is irrelevant.

d. Page 37, lines 6-9.

Admissible. What the plaintiff told Dr. Founds regarding his health is relevant.

9. The following evidentiary ruling is made in regard to the deposition testimony of Dr. Larry Broadwell:

Pages 18 and 19 of Dr. Broadwell's testimony are admissible, since questions were asked during cross-examination regarding plaintiff's complaints of pain, and the response of Dr. Broadwell on redirect clarifies his response to those questions.

10. The following evidentiary ruling is made in regard to the deposition testimony of Dr. James C. McDaniel:

The articles sought to be introduced during redirect examination (plaintiff's exhibit Nos. 33 and 20) are inadmissible since they are beyond the scope of cross-examination.

11. Defendant's motion *in limine* regarding the admissibility of plaintiff's exhibit Nos. 25, 26-1 and 26-2 will not be ruled on, insofar as these exhibits are only relevent to issues not reached by this Court.

Lafayette, Louisiana, October 27, 1988.

/s/ John M. Duhe', Jr.

JUDGE, U. S. DISTRICT COURT

Q Have you released Willie Burr to return back to work as of the last day you have seen him?

A I have not.

Q Based on the history that you were given by the patient, your treatment, the diagnostic tests that were done by you, do you have an opinion to a reasonable degree of medical probalility as to the cause of the injury which you have been treating Willie Burr for since July, 1987?

MS. DAIGLE:

Let me enter an objection. I don't think you can ask a doctor to render an opinion on such an issue unless you have given him every piece of medical evidence, especially in this case which indicates significant periods of time when Mr. Burr had no objective signs of injury, which indicates an incident involving hauling wood, which indicates psychogenic pain disorder and a multitude of other information that someone would have to have to be in a position to answer that question. Subject to the objection —

BY MS. MURRAY:

Q Doctor, do you remember my question? Can you answer it?

A Yes. Given the history that Mr. Burr gave me in my original in-take history, I would relate the findings that I found at surgery to the incident that he related to me of the slip and the injury to his back.

Q Given the history and the treatment and the diagnostic tests that you had done, you would think that it is more likely than not that the cause for the injury that you were treating him for was the accident that he had in August of 1986?

MS. DAIGLE:

Same objection.

BY MS. MURRAY:

Q Subject to the objection.

A Correct.

Q Doctor, I am going to ask you, with regard to this type of injury, are there times when a patient will have no symptoms?

A It is characteristically intermittent related to activity and relieved by rest.

Q Are there times that the patient will have more symptoms than others?

A Correct.

Q So if you were to be told that in addition to the history that you were given and the physical examination that you performed, all the diagnostic tests that you had ordered, if you were also told that there were times when Mr. Burr was pain-free, that would not change your opiinion that the injury for which you were treating him was related to the accident in August of 1986?

MS. DAIGLE:

Same objection.

THE WITNESS:

Correct.

BY MS. MURRAY:

Q And I think you have had an opportunity now to review the records from the P&S Hospital and from Dr. Osborne as well. Is there anything in those records that would change your opinion that the injury for which you were treating Mr. Burr was related to his accident of August of 1986?

MS. DAIGLE:

Same objection.

THE WITNESS:

No, his MR was abnormal. His response to the placebo injection showed he was not a malingerer and the MR was abnormal early on.

BY MS. MURRAY:

Q Would the fact that he was able at some point in time to be able to lift weights and to go through some ergometric testing change your opinion that in fact he hasn't had an injury for which you were treating him which was related to his accident of August of 1986?

MS. DAIGLE:

Same objection.

THE WITNESS:

No.

BY MS. MURRAY:

Q Doctor, isn't it true that with someone with a problem such as this that certain acitivities may irritate or aggravate that problem?

A Yes, characteristically it is related to activity and relieved by rest.

Q So if a person said that after carrying wood, he had more pain, that would not be inconsistent in your experience?

A That would be consistent.

Q And that would not necessarily change your opinion that the injury for which you were treating Mr. Burr is related to the accident that he had in August of 1986?

MS. DAIGLE:

Same objection.

THE WITNESS:

Correct.

(2)

Supreme Court, U.S.
FILED
OCT 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-519

In the Supreme Court of the United States

OCTOBER TERM, 1989

DEBRA BURR, wife of/and WILLIE BURR
Petitioners

VERSUS

HUTHNANCE DRILLING COMPANY
AND THE D/V VANGUARD II
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWIN G. PREIS, JR.
CHARLES A. MOUTON
PREIS & KRAFT
(A Professional Law Corporation)
P. O. Drawer 94-C
Lafayette, LA 70509
(318)237-6062

Attorneys for Huthnance Drilling
Company and D/V VANGUARD II

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

20 pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner presents two questions for review. Question 1 pertains to petitioner's entitlement to maintenance and cure benefits where the trial and appellate courts determined that the medical evidence established that there was no objective finding of injury which would prevent petitioner from returning to work in the oilfield eight months after his alleged accident and petitioner relied solely on the testimony of a physician who evaluated the plaintiff over ten months after the alleged incident upon referral from his attorney and after numerous physicians who treated petitioner could find no evidence of injury. This question does not involve any conflict of the Circuits or other compelling question of law for resolution and merely seeks further appellate review of the decisions of the two lower courts whose decisions to deny maintenance and cure benefits were premised on petitioner's credibility, which was determined by the trial court to be "poor".

Question 2 seeks a determination of whether petitioner is entitled to compensatory and punitive damages for defendants' refusal to pay maintenance and cure benefits.

Respondents submit that neither question is appropriate for review by Writ of Certiorari as neither question falls within the perameters set forth in Rule 17.1 of the rules of the Supreme Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE 1
SUMMARY OF THE ARGUMENT 6
ARGUMENT 7
CONCLUSION 13

TABLE OF AUTHORITIES

Rule 17.1 of the Rules of the Supreme Court i,8

Supreme Court Rule 17.1(a) 8

Supreme Court Rule 17.1(c) 8

Rule 54(b) of the Federal Rules of Civil Procedure 6

CASE:

Johnson v. Offshore Express, Inc. 845 F.2d 1347, 1352 (5th Cir. 1988) 9

Morales v. Garijak, Inc. 929 F.2d 1355, 1359 (5th Cir. 1987) 11

National Collegiate Athletic Association v. Board of Regents of The University of Oklahoma 104 S.Ct. 2948, 82 L.Ed.2d 70, 468 U.S. 85 (1986) 8

Rice v. Sioux City Memorial Park Cemetary, Inc. 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955) 7

U.S. v. Johnston 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496 (1925) 8

STATEMENT OF THE CASE

Petitioners, Willie Burr and his wife, Debra McClannahan Burr, filed suit for damages allegedly arising out of an incident which occurred on August 4, 1986 while Willie Burr was employed by Huthnance Drilling Company. Mr. Burr was pulling drill slips on the rig floor of the D/V VANGUARD II with Ronnie McGowen when he felt a sharp pain. He continued to work on the drill floor with his co-worker for approximately one hour following the incident and completed his tour. Some time following the alleged incident, Mr. Burr advised McGowen in a laughing manner that he had injured himself, but did not mention any complaints of back pain. He also later indicated to a coworker, Emmett Smallwood, that he injured his groin. The Huthnance Supervisor's Report of Accident Investigation signed by Mr. Burr records Mr. Burr's injury as " pain in lower groin area". Mr. Burr did not request any medical assistance aboard the drilling rig nor did he ask to be transported to shore prior to his regularly scheduled crew change.

Willie Burr was initially evaluated by Dr. Garland Miller, a general practitioner in Zwolle, Louisiana, who had formerly treated Burr's son. A CT scan performed at the request of Dr. Miller was interpreted as normal. Dr. Miller was Mr. Burr's choice of physician.

Huthnance was notified that Mr. Burr had seen a physician in his hometown of Many, Louisiana after completing his hitch and immediately began paying maintenance and cure benefits.

Dr. Miller referred Mr. Burr to Dr. J. E. Smith, an orthopedist in Shreveport, Louisiana. Dr. Smith treated him from August 20, 1986 through February 9, 1987, con-

cluding that Mr. Burr had no objective evidence of a disc injury and could return to work in the oilfield. Mr. Burr was also referred by his attorney to Dr. Larry Broadwell, a rheumatologist, who was of the opinion that Burr had some sort of emotional problems, whether conscious or subconscious. From an objective standpoint, Dr. Broadwell found nothing that would prevent Willie Burr from returning to work as a roustabout in the oilfield on February 23, 1987.

From August 19, 1986 to February 5, 1987, Willie Burr attended sixty-two physical therapy sessions under the supervision of Mary Miller. During those visits, Burr complained of various types of pain on an irregular and infrequent basis. He did not complain of pain in his lower back until December 2, 1986. Prior to that time, during the sessions where he did complain of pain, it was limited to his upper back or leg.

Maintenance and cure benefits continued until April of 1987 when Huthnance was advised by Dr. Phillip Osborne, the supervising physician, of an eleven day in-patient program at the Physicians and Surgeons Hospital Pain Unit in Shreveport, Louisiana, that Willie Burr had reached maximum medical cure and could return to work in the oilfield as a roustabout. Mr. Burr was admitted to the P & S Pain Unit as a result of a referral from Dr. Miller, the physician initially selected by Mr. Burr. Dr. Osborne is a specialist in evaluating and treating chronic pain and rehabilitation problems and was Mr. Burr's primary physician during his eleven day stay at the facility. During the course of his eleven day in-patient admission, Willie Burr underwent a complete battery of tests, including an MRI, all of which were interpreted as negative. He participated in work hardening and work fitness programs under a physician's supervision. He was also evaluated by a

neurosurgeon and released from the hospital pain-free. Dr. Osborne calculated that the combined accuracy rate of all of the tests performed on Mr. Burr was ninety-nine percent. After being given every benefit of the doubt, Dr. Osborne released Burr to return to work in the oilfield as of April 10, 1987. Dr. Osborne's opinion was based on the lack of objective evidence of a back injury.

In June of 1987, Mr. Burr was referred by his attorney to Dr. Stuart Phillips, an orthopedist in New Orleans, Louisiana. Dr. Phillips initially evaluated Mr. Burr on June 23, 1987, more than ten months following the alleged injury. During his initial evaluation, Dr. Phillips diagnosed an internal disc disruption after reviewing selected medical records which were forwarded by Burr's attorney and without conducting any diagnostic tests. On July 23, 1987, Mr. Burr returned to Dr. Phillips "on an emergency basis" with an exacerbation of his problems. It was not until after Burr returned with an exacerbation of his complaints that any diagnostic tests were performed at Dr. Phillips' request. Dr. Phillips made the controversial diagnosis of "internal disc derangement" without the benefit of Burr's past medical records which revealed that other physicians and a physical therapist felt that Burr was malingering and without knowledge that he had been released "pain-free" from a pain clinic three months prior to seeing him. Additionally, Dr. Phillips felt it important to know that Mr. Burr completed a work hardening program in which he worked with thirty to forty pound weights.

After receiving reports of Dr. Phillips' diagnosis, defendants immediately submitted all of Dr. Phillips' records and reports to Dr. Osborne for review. Dr. Osborne re-evaluated Willie Burr on September 1, 1987 indicating that "you wouldn't recognize the patient". Dr. Osborne issued a report on September 25, 1987 reiterating his

earlier opinion that Willie Burr was fit to return to work in the oilfield on April 10, 1987 and did not have a disc problem at that time. After consultations with a neurosurgeon and an orthopedic surgeon, Dr. Osborne was confident that Burr could not have participated in the work hardening program if he had the condition diagnosed by Dr. Phillips.

Willie Burr was also referred by counsel for Huthnance to Dr. James C. McDaniel, an orthopedic surgeon in Lafayette, Louisiana, for evaluation. Dr. McDaniel concluded that Willie Burr had no orthopedic or neurologic injury and felt that Burr was a malingerer and was not experiencing *any* pain. Huthnance did not reinstate maintenance and cure benefits to Willie Burr based on the opinions of Drs. Osborne and McDaniel.

Willie Burr ultimately underwent an anterior lumbar fusion on January 11, 1988 performed by Dr. Phillips. Dr. Phillips extracted degenerated disc material during the surgery from the L5-S1 level. However, Dr. Phillips admitted that what he found when he performed surgery either could or could not cause pain. Dr. McDaniel testified at trial that the degenerative disc that Dr. Phillips found during surgery is found in a high percentage of people thirty years of age.

Prior to the surgery, and at the request of Dr. Phillips, Dr. Lane Salzar, a clinical psychologist, evaluated Willie Burr and concluded that he displayed both hyperchondriacal and hysterical personality features and he appeared to be experiencing "psychological factors which effected his physical condition".

Petitioners originally brought an action adverse to Huthnance Drilling Company and the D/V VANGUARD II alleging negligence under the Jones Act, unsea-

worthiness and entitlement to maintenance and cure benefits under the General Maritime Law. Petitioners later amended their Complaint to include a claim for punitive and compensatory damages for the defendants' refusal to pay maintenance and cure benefits. Thereafter, petitioners filed a Motion to Sever the maintenance and cure claim and to set the matter for an expedited bench trial. The trial court granted the Motion to Sever and the claim was set for hearing on September 6, 1988.

On September 6, 1988, petitioner's maintenance and cure claim was tried before the Honorable John M. Duhe. Plaintiff submitted the deposition testimony of Dr. Charles Aprill and Dr. Stuart Phillips in support of its assertion that the condition diagnosed by Dr. Phillips and which ultimately necessitated surgery was causally related to the incident on August 4, 1986 aboard the D/V VANGUARD II. The defendant submitted the depositions of Dr. James C. McDaniel, Dr. Larry K. Broadwell, Dr. Phillip Osborne, Dr. Warren Founds, Dr. J. E. Smith, Dr. Warren D. Long, Jr., Dr. Donald E. Wolfe, and Mary Margaret Miller, physical therapist, to establish that the condition which caused Willie Burr back pain subsequent to April 10, 1987 was not caused by the August 4, 1986 incident while in the employ of Huthnance.

After taking the matter under advisement, Judge Duhe issued Findings of Fact and Conclusions of Law finding that Willie Burr had reached maximum medical cure on April 10, 1987 and had failed to prove by a preponderance of the evidence that any condition or injury which may have resulted in back pain following April 19, 1987 was causally related to any injury or condition which manifested itself while plaintiff was in the employ of Huthnance Drilling Company. The trial court specifically found that Dr. Phillips could not state that what he

reported as a degenerative disc was caused by the alleged incident aboard the D/V VANGUARD II. The trial court further found that Dr. Phillips' diagnosis and treatment was based primarily on the accuracy of the history related to him by Mr. Burr and Mr. Burr's complaints. Respondents place great emphasis on the finding of the trial court that petitioner's credibility is poor, citing numerous discrepancies and inconsistencies in the complaints voiced during his treatment and the opinions of the physical therapist and orthopedist that plaintiff was a malingerer.

A judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure was entered by the court upon motion of respondents and petitioners perfected a timely appeal to the United States Fifth Circuit Court of Appeals. The Fifth Circuit entered a *per curium* opinion dated June 9, 1989 affirming the decision of the lower court. In support of its decision, the Fifth Circit referred to the substantial medical evidence which indicated that there was no objective finding of a back injury as of April 10, 1987, the determination that Dr. Phillips' opinion was based primarily on Willie Burr's statements and the district court's finding that Willie Burr was not credible, thus discounting the statements upon which Dr. Phillips relied. On July 5, 1989, the Fifth Circuit Court of Appeals denied plaintiff's suggestion for panel rehearing and rehearing *en banc.*

SUMMARY OF THE ARGUMENT

Respondents respectfully submit that this matter does not involve a decision which is contrary to decisions of the Court of Appeals of other circuits, does not involve a departure from the accepted and usual course of judicial proceedings, nor does it involve an important question of federal law which has not been decided by the Supreme

Court such that this court should exercise its discretionary power of review. The district court's Findings of Fact and Conclusions of Law and the subsequent approval of that decision by the Fifth Circuit Court of Appeals was based on the district court's weighing the entirety of the medical evidence with regard to the treatment of petitioner, the credibility of petitioner and the appropriate legal standards with respect to the issues of petitioner's entitlement to maintenance and cure. Respondents respectfully submit that petitioner is seeking, through the Petition, to have the Supreme Court grant a Writ of Certiorari to review the evidence of the case and discuss the specific facts of petitioner's entitlement to maintenance and cure benefits, which is not within the perameters of certiorari review. This matter does not involve "principles the settlement of which is of importance to the public", but rather involve issues of fact the resolution of which are of interest only to the parties involved. See *Rice v. Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955).

ARGUMENT

I. THE LOWER COURTS DID NOT ERR IN DENYING PETITIONER'S CLAIM FOR MAINTENANCE AND CURE BENEFITS SUBSEQUENT TO APRIL, 19, 1987 WHERE, PRIOR TO THAT TIME, A NUMBER OF MEDICAL SPECIALISTS FOUND NO EVIDENCE OF INJURY AND THE EVIDENCE IN SUPPORT OF THE CLAIM FOR MAINTENANCE AND CURE WAS THE SINGLE CONTRARY OPINION FROM A PHYSICIAN WHOSE DIAGNOSIS AND TESTIMONY WITH RESPECT TO CAUSATION WAS BASED ON THE PLAINTIFF'S STATEMENTS, AND PLAINTIFF'S CREDIBILITY WAS FOUND TO BE UNTRUSTWORTHY.

Respondents submit that there is an insufficient basis for the Supreme Court to exercise its discretion to grant certiorari to review the instant case. Rule 17.1 of the Supreme Court rules provides an illustrative list of considerations which govern the review on a Petition of Certiorari. Petitioner has not asserted that the Fifth Circuit Court of Appeals decision is in conflict with the decision of another Federal Court of Appeals nor has there been any assertion that the lower court decisions have "so far departed from the accepted and usual course of judicial proceedings" so as to warrant review by this court. Supreme Court Rule 17.1(a). Petitioner has also failed to assert that the Fifth Circuit Court of Appeals has decided an important question which has not been settled by the United States Supreme Court. Supreme Court Rule 17.1(c). The issues raised by petitioner turns on the facts of the case and the conclusions of law reached by the respective lower courts and are of interest only to the parties involved, as opposed to the public. Petitioner is asking the Supreme Court to set aside the Findings of Fact of the lower courts or reverse the decisions due to an error of law. This basis for seeking review to the Supreme Court is insufficient for the exercise of this Court's discretion in granting certiorari herein.

The Supreme Court has consistently held that it will not grant a Writ of Certiorari to review evidence and discuss the facts of a specific case. *U. S. v. Johnston*, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496 (1925). Additionally, the Supreme Court traditionally accords great weight to a fact-finding which has been made by a district court and approved by a court of appeals. *National Collegiate Athletic Association v. Board of Regents of The University of Oklahoma*, 104 S.Ct. 2948, 82 L.Ed.2d 70, 468 U.S. 85 (1986). Willie Burr is asking the Supreme Court to review the decisions of two lower courts whose findings were made

after weighing the entirety of the evidence and determining that Burr failed to prove his entitlement to maintenance and cure benefits beyond the date his employer ceased payments. In support of his Petition, plaintiff cites the testimony of a physician who examined the plaintiff over ten months after the date of the alleged accident and whose diagnosis and opinion with respect to surgery was based to a large extent on the history provided by Burr. The district court assessed the credibility of Willie Burr and found it to be "poor".

Respondents dispute the fact that Dr. Phillips was plaintiff's treating physician and suggest that this physician was called upon by petitioner's attorney to "treat" Burr only after all other experts had found no evidence of injury. Mr. Burr was treated by numerous physicians, including an orthopedist, neurosurgeon, rheumatologist, general practitioner and ergonomics expert prior to being referred by his attorney to Dr. Phillips. Respondents did *not* refer Burr to any of these physicians or to the P & S Clinic and any inference by the petitioners to the fact that the defendants hired physicians to testify in their favor is grossly misleading.

The lower courts in this case chose to accept the substantial medical evidence establishing the lack of injury and that Willie Burr was capable of returning to work in the oilfield as of April 10, 1987 over that of a physician who petitioner saw at the requests of his attorney over ten months after the date of the alleged incident and who relied on the veracity of the petitioner in rendering his opinion. These issues, and particularly the issue of causation, are treated as fact questions in admiralty cases. *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988). Consequently, this matter does not involve an important question of law for the court's consideration.

This case does not involve the situation where the employer sent a seaman to a physician for an independent medical examination and the court chose to accept that physician's opinion over the seaman's treating physician. Quite the contrary, this case involves the plaintiff attorney's referral of the seaman to a physician after all other "treating" physicians who were either chosen by the seaman or who were treating him on referral from his hometown physician could find no objective evidence of injury.

These findings do not represent a departure from the principles of the maintenance and cure remedy and do not raise important considerations from the standpoint of future cases so as to warrant this court exercising its supervisory power to review those Findings of Fact and Conclusions of Law. Respondents would request that the Petition for Writ of Certiorari be denied.

As respects the merits of the Petition, petitioner would have the Supreme Court hold that whenever there is conflicting medical testimony, the court must accept the testimony of the physician who evaluates the seaman at the requests of his attorney, diagnoses a "condition" and relates it to the incident based on the history given by the seaman irrespective of what prior physicians have found and their opinions. If petitioner's assertions were accepted, the trial court would not be entitled to assess the basis of the physicians' opinions, weigh the conflicting evidence and make a credibility judgment to determine that, even resolving all doubts and ambiguities in favor of the allegedly injured seaman, the weight of the evidence establishes that plaintiff reached maximum medical cure. Such a holding would allow the plaintiff to "doctor shop" until he has found one physician to testify that, based on what the seaman has told him, he diagnoses a "condition" which

necessitates surgery and which is related by history to a particular incident. The seaman would recover maintenance and cure benefits under this scenario irrespective of whether the history given to the physician is accurate or trustworthy and regardless of how many doctors who treated the individual immediately following the incident say otherwise. Respondents respectfully submit that the General Maritime Law, although construed favorably with regard to an injured seaman, does not afford the seaman such relief.

In response to petitioner's assertion that Dr. Phillips' testimony alone supports a claim for maintenance and cure benefits, as a matter of law, the United States Fifth Circuit Court of Appeals properly cited the case of *Morales v. Garijak, Inc.*, 929 F.2d 1355, 1359 (5th Cir. 1987), and distinguished that case from the present one on the basis that the testifying physicians' testimony in *Morales* was uncontroverted. The Fifth Circuit pointed out that in the present case, "a number of specialists found no injury and the single contrary opinion was based on untrustworthy medical history". This is clearly the proper analysis with regard to a claim for maintenance and cure benefits where the medical evidence is seriously in dispute. Further review by this court of the standard applied in this maintenance and cure case is therefore unwarranted.

The physicians who saw Burr at his or his hometown physicians' request could find no objective evidence of injury which would prevent Willie Burr from returning to work in the oilfield as a roustabout. The testimony presented at trial further established that this determination was made only after resolving all ambiguities or doubts in favor of Mr. Burr. The trial court found that Willie Burr's credibility was "poor". There were a significant number of inconsistencies in the location and nature

of his complaints throughout the course of his treatment and the physical therapists and orthopedist advised that he was malingering. He was also diagnosed as having a "psychogenic pain disorder". Lastly, the finding by Dr. Phillips during surgery was, by his own admission, one that may or may not have caused pain and according to Dr. McDaniel is commonly found in a high percentage of people who are thirty years of age or older. Thus, petitioner's assertion that Dr. Phillips confirmed a disc injury during surgery is not accurate. The trial court *did not* make a finding that petitioner suffered from a "condition" which necessitated surgery. The court only found that "*any* back injury or condition which resulted in back pain to plaintiff following April 19, 1987 were not causally related to any injury or condition which manifested itself while plaintiff was in the employ of Huthnance", without finding that there actually was any such condition. Thus, it remains disputed that petitioner suffered from "a verified orthopedic injury" as asserted in the Petition.

Considering the substantial medical evidence, including an eleven day in-patient stay at the P & S Pain Clinic in Shreveport, Louisiana, wherein plaintiff underwent diagnostic tests, work fitness and work hardening program, the district court was afforded substantial support for its finding that "any back injury or condition which resulted in back pain to plaintiff following April 19, 1987 were not causally related to any injury or condition which manifested itself while plaintiff was in the employ of Huthnance". (See Conclusion of Law No. 8, Appendix D of petitioners' brief.) Without more than a mere assertion by petitoner that the trial court and Fifth Circuit Court of Appeals were incorrect in finding that plaintiff was not entitled to maintenance and cure benefits beyond April 19, 1987, this issue does not warrant further consideration by this court.

Petitioners request that the Supreme Court review the evidence in this case to determine whether plaintiff is entitled to compensatory and punitive damages for defendant's refusal to pay maintenance and cure benefits also lacks the necessary requirements for review by this court. However, out of an abundance of caution, respondents suggest that it is difficult to understand how petitioners can continue to maintain an action for punitive and compensatory damages for failure to pay maintenance and cure in light of the trial court and appellate court's finding that respondents were correct in refusing to pay maintenance and cure benefits beyond the date that they were terminated based upon the opinion of plaintiff's treating physicians. Respondents diligently investigated petitioner's claim for maintenance and cure after receiving Dr. Phillips' diagnosis and again after surgery was performed and did not act in an arbitrary and capricious manner when benefits were not reinstated.

CONCLUSION

The questions presented by petitioners for review are not sufficient to compel the Supreme Court to exercise its discretion in granting certiorari to review the decisions of lower courts. Petitioner is requesting that this Honorable Court review the evidence presented to the trial court, and in particular the testimony of Dr. Stuart Phillips, to decide whether the lower courts were correct in finding that plaintiff failed to bear his burden of proving that his injury, if any, occurred, was aggravated, or manifested itself while in the service of the D/V VANGUARD II. The issues in this matter with regard to causation turn entirely on the facts as presented by the evidence in the case and the credibility of the respective witnesses and do not raise any issue of

substantial importance which has not been decided by the Fifth Circuit nor does it present an important issue of federal law which should be settled by the Supreme Court. As noted by the Fifth Circuit Court of Appeals, the trial court's decision is amply supported by the evidence and was well reasoned. For these reasons, respondents respectfully submit that the Petiton for Writ of Certiorari should be denied.

PREIS & KRAFT
(A Professional Law Corporation)

By: _____
EDWIN G. PREIS, JR. (10703)
CHARLES A. MOUTON (17721)
P. O. Drawer 94-C
Lafayette, LA 70509
Phone: 318-237-6062

Counsel for Huthnance Drilling
Company and the D/V VANGUARD II

CERTIFICATE

I HEREBY CERTIFY that the above and foregoing document has this date been forwarded to all known counsel of record by placing a copy of same in the United States mail, properly addressed and postage prepaid.

Lafayette, Louisiana, this 20th day of October, 1989.

_____

EDWIN G. PREIS, JR.